Supreme Court, U. S.
FILED
OCT 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-571

PEOPLE OF THE STATE OF ILLINOIS,
Petitioners,

vs.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
JOSEPH V. KARAGANIS,
SANFORD R. GAIL,
Special Assistant Attorneys General,
KARAGANIS and GAIL, LTD.,
150 North Wacker Drive,
Chicago, Illinois 60606,
(312) 782-1905.

October 5, 1979.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Statement of Issues	3
Statutes and Rules Involved	4
Statement of the Case	8
A. Procedural History	8
B. Bases of Liability	9
C. The Remedy to Destroy Disease-Causing Organisms	10
1. Collection	10
2. Treatment to Destroy Pathogens	11
D. The Action of the Court of Appeals	14
E. Effluent Limitation	16
Reasons for Granting the Writ	19
I. In Overturning the District's Court's Remedy and Substituting Its Own Remedy Based on Extra-Record Factual Assumptions, the Court of Appeals Usurped the Basic Fact-Finding Function of the District Court	19
A. The Application of the Clearly Erroneous Standard	19
B. The Appellate Court's Failure to Remand	23
II. The Court of Appeals Erroneously Disregarded the Plaintiffs' Remedies Under State Statute and Common Law	26
A. State Statutory and Common Law Claims Should Be Heard	26
B. The Court of Appeals Misunderstood the Statutory Structure of the Clean Water Act	28
Conclusion	31

CITATIONS.

Cases.

Committee for Jones Falls Sewage System v. Train, 539 F.2d 1006 (4th Cir. 1976) 28

Cordova v. Fox, 351 F. 2d 269 (10th Cir. 1965) 24

DeMarco v. United States, 415 U. S. 449 (1974) 24

Illinois v. Milwaukee, 406 U. S. 91 (1972) 8

Illinois v. Milwaukee, 599 F. 2d 151 (7th Cir. 1979) ... *passim*

Illinois v. Milwaukee, No. 72-C-1253 (N. D. Ill. "Findings of Fact and Conclusions of Law," July 29, 1977) .... *passim*

Ohio v. Wyandotte Chemicals Corp., 410 U. S. 493 (1971) 9, 28

Zenith Radio Corp. v. Hazeltine, 395 U. S. 100 (1969) .. 20

Statutes.

Judicial Code, 28 U. S. C.

§ 1251(a)(1) 8

§ 1254(1) 2

Clean Water Act, 33 U. S. C. §§ 1251 *et seq.*

§ 1251 ..... 27, 29

§ 1311(b)(1)(B) 15, 27, 29

§ 1311(b)(1)(C) 15, 27, 29, 30

§ 1312 ..... 27, 29, 30

§ 1313 ..... 27, 29, 30

§ 1365(e) 28

§ 1370 27-28

Illinois Environmental Protection Act, Ill. Rev. Stat., ch. 111½ pars. 1001 *et seq.*
§ 1003 8-9
§ 1012(a) 8

Court Rules.

Federal Rules of Civil Procedure
Rule 52(a) 3, 14-15, 19-20, 26, 31

Administrative Regulations.

40 C. F. R. Part 133 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979.

No. 79-408.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner is the State of Illinois acting through William J. Scott, Attorney General of Illinois. The petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on April 26, 1979.

OPINIONS BELOW.

The opinion of the Court of Appeals, dated April 26, 1979, is reported at 599 F. 2d 151 (7th Cir. 1979), and is reproduced in the appendix to the Petition for Certiorari filed by the City of Milwaukee, The Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee[1] (hereafter Appendix). That Appendix also contains an unpublished order, entered by the Court of Appeals on April 26, 1979, which contains the Court's factual discussion of the evidence. (Appendix B-1 *et seq.*) See Court's published opinion, 599 F. 2d 151; 167 n. 31 (Appendix A-27) Also enclosed in the Appendix is the order of the Appellate Court denying the plaintiff-appellees' petition for rehearing (Appendix p. C-1), the Judgment Order of the District Court, dated November 15, 1977 (Appendix p. D-1), and the District Court's Findings of Fact and Conclusions of Law, dated July 29, 1977. (Appendix p. F-1)

JURISDICTION.

The Seventh Circuit entered judgment on April 26, 1979. A timely petition for rehearing was denied on June 14, 1979. On September 12, 1979, Mr. Justice Stevens entered an Order granting an extension of time until October 5, 1979, for the filing of this petition for certiorari. This Court's jurisdiction is invoked under the provisions of 28 U. S. C. § 1254(1).

---

1. All three Milwaukee-area municipal defendants are hereafter collectively called Milwaukee.

STATEMENT OF ISSUES.

1. Where the District Court has found, and the appellate court has affirmed, that Milwaukee's discharges of raw and improperly treated sewage—containing billions of disease-causing viral and bacterial organisms—are transported into Illinois waters where such organisms can contaminate the water supply and infect swimmers, thus posing a "significant risk of injury to Illinois residents," and the appellate court had properly reviewed the evidentiary basis of the liability issue under the "clearly erroneous" standard of Rule 52(a) of Federal Rules of Civil Procedure, may the appellate court disregard the limitations of Rule 52 in reviewing the evidentiary basis of the remedial order entered by the District Court and order its own remedy on the basis of extra-record factual presumptions?

2. Where the District Court has found, and the appellate court has affirmed, the liability of Milwaukee for creating a public health nuisance in Illinois waters, and the appellate court finds that the evidence in the record below as to remedy is uncertain with regard to the degree of treatment required to destroy disease-causing organisms, is the appellate court free to fashion its own remedy on the basis of extra-record presumptions, or should it remand to the District Court for the taking of additional evidence to resolve those areas of uncertainty regarding the remedy?

3. Was the appellate court correct in disregarding the claims made by the State of Illinois under Illinois law, both under the state common law of nuisance and under the Illinois Environmental Protection Act?

STATUTES AND RULES INVOLVED.

1. Rule 52(a) of the Federal Rules of Civil Procedure, which provides in pertinent part as follows:

   Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given of the opportunity of the trial court to judge of the credibility of the witnesses. . . .

2. The following sections of the Clean Water Act:

   a. Section 101(a), which provides in part as follows:

      (a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—

         (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

         (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983, . . .

   b. Section 301, which provides in part as follows:

      (b) In order to carry out the objective of this Act there shall be achieved—

      * * * * *

         (1)(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act; or,

         (C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet

water quality standards, treatment standards, or schedule of compliance, established pursuant to any State law or regulations (under authority preserved by section 510), or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

c. Section 302, which provides as follows:

(a) Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 301(b)(2) of this Act, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b)(1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this Act) and to determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.

(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be ob-

tained (including attainment of the objective of this Act), such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person.

d. Section 303, which provides in part as follows:

(d)(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 301 are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

e. Section 505(e), which provides as follows:

Nothing in this section shall retrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

f. Section 510, which provides as follows:

Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any

State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

3. The following sections of the Illinois Environmental Protection Act:

   a. Section 3(n), which provides as follows:

      "Water pollution" is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

   b. Section 12(a), which provides as follows:

      No person shall:

      (a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act;

* * * * *

STATEMENT OF THE CASE.

A. Procedural History.

This case centers on the discharge by defendants of enormous volumes of raw and improperly treated human feces into Lake Michigan. Illinois originally brought this action as an original Bill of Complaint before the United States Supreme Court. However, in 1972 the Supreme Court held that Milwaukee was not a state for purposes of mandatory original jurisdiction by the Supreme Court over actions between the states under 28 U. S. C. § 1251(a)(1). The Supreme Court did hold however that Illinois could bring an original action against Milwaukee in the federal District Court under the doctrine of federal common law nuisance. *Illinois* v. *City of Milwaukee,* 406 U. S. 91 (1972).

In 1972 Illinois filed a complaint in federal District Court seeking to abate Milwaukee's fecal discharges. The complaint was in three counts. Count I charged Milwaukee with the creation of a federal common law nuisance. Count II charged Milwaukee with violation of statutory prohibitions against water pollution contained in the Illinois Environmental Protection Act. Ill. Rev. Stat. Ch. 111½ § 1001 *et seq.*[2]

---

2. Ill. Rev. Stat. Ch. 111½, § 1012 states in part:

"No person shall:

(a) Cause or threaten or allow the discharge of any contaminants into the environment *in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources,* or so as to violate regulations or standards adopted by the Pollution Control Board under this Act;" (Emphasis added.)

Ill. Rev. Stat. Ch. 111½, § 1003(n), defines "water pollution" as:

"[S]uch alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such

(Footnote continued on next page.)

Count III charged Milwaukee with the creation of a common law nuisance under Illinois law pursuant to the remedy articulated in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493 (1971).

The operative factual allegations were the same for all three counts. The complaint alleged that Milwaukee's discharges of both untreated and improperly treated sewage degrade the quality of Illinois waters of Lake Michigan as a source of drinking water, body contact recreation, sailing, fishing and other uses of the Lake. Subsequent to the filing of the Illinois complaint, the State of Michigan intervened as a plaintiff.

The case came to trial in January 1977. After hearing months of testimony and reviewing hundreds of exhibits, the District Court entered judgment finding that defendants' discharges constituted:

(a) a federal common law nuisance;

(b) a common law nuisance under Illinois state law;

(c) a violation of the Illinois Environmental Protection Act which prohibits any acts which may cause water pollution in Illinois. (Appendix F-2, F-24.)

B. Bases of Liability.

The basis of liability was two-fold. The first basis of liability was grounded on the enormous health hazard created by Milwaukee's discharges of raw and partially treated sewage into Lake Michigan. The District Court found that:

(Footnote continued from preceding page.)

> discharge of any contaminant into any waters of the State, *as will or is likely to create a nuisance* or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life."

1. Milwaukee discharges enormous quantities of viral and bacterial pathogens[3] in its raw and partially treated sewage into Lake Michigan. (Appendix F-6)

2. These disease-causing organisms are periodically transported southward into Illinois waters by shore parallel currents, thus exposing Illinois beaches and water supply intakes to these disease hazards. (Appendix F-6 to F-8)

The second basis of liability rested on the problem of "eutrophication" or accelerated aging of Lake Michigan. The enormous quantities of human feces discharged by defendants contain large amounts of phosphorus and other nutrients which are accelerating the aging of Lake Michigan. These nutrient discharges —in combination with other nutrient sources—are creating and stimulating the growth of obnoxious organisms which cause taste and odor problems in drinking water and unpleasant bathing conditions and create conditions hostile to aquatic life.[4] (Appendix F-16 to F-20)

C. The Remedy to Destroy Disease-Causing Organisms.

Having found liability, the District Court entered a judgment order designed to abate the disease nuisance. The District Court's remedy with respect to the elimination of disease-causing organisms was in two parts:

1. Collection.

The District Court ordered that all of the raw sewage be collected for treatment instead of being discharged into Lake

3. One single gram of feces from an infected viral disease carrier can contain literally millions of viruses. (Tr. 10278) These viruses contain such diseases as polio, pleurodynia, myocarditis, meningitis, and encephalitis. (Tr. 2163-2170)

4. The court's finding of eutrophication liability is not at issue in this petition, nor is the remedy ordered to abate eutrophication the subject of the petition. The District Court ordered *less than* 1 mg/l phosphorus which would be "the inevitable consequence of the type of advanced treatment which is being ordered" to prevent discharge of disease-bearing organisms. (Appendix F-26)

Michigan. The court did not order a particular method of collection but required the parties to draft an order selecting a method for collection. (Appendix F-26) The parties selected a method of collection that called for a conveyance storage and treatment system and submitted this system as part of a stipulated judgment order. (See p. 16, n. 8, *infra*)

2. Treatment to Destroy Pathogens.

The District Court then ordered that all of the raw sewage—once collected—be given a level of treatment sufficient to destroy the disease-causing organisms in the sewage prior to discharge.

The logic of the District Court's order on the destruction of disease-causing organisms is simple.

a. At Milwaukee's existing sewage treatment plants, chlorine is used as a disinfectant to destroy virus and bacteria.

b. However, chlorine is only reliable and effective as a pathogen-destroying agent in its "free"-chlorine form, *i.e.* as hypochlorous acid. When organic material in the sewage (measured by a term called Biochemical Oxygen Demand) comes into contact with free chlorine, the resultant compound is called "combined chlorine" which is at best a much slower acting disinfectant and often has no pathogen killing capability. (Tr. 12065 to 67) The unanimous recommendation of plaintiffs' experts was that organic material be removed to as low levels as possible to minimize the formation of "combined chlorine" and to allow "free" chlorine (hypochlorous acid) to disinfect the sewage. (Tr. 12068) They recommended that the organic content be reduced to 5 mg/l BOD. (Tr. 3206)

c. Even where organic material is removed to allow the presence of free chlorine, fecal-solids material can encapsulate the disease-causing organisms (pathogens) and prevent the chlorine from reaching the pathogens. It was the unanimous recommendation of plaintiffs' experts that solids

> should be removed from the sewage as far as possible to allow the free chlorine to reach the pathogens. (Tr. 12068) Plaintiffs' experts recommended a solids effluent level of less than 5 mg/l. (Tr. 3091, 12402)

The recommendations and testimony of plaintiffs' witnesses[5] were corroborated by the defendants' own evidence. Defendants' only witness on the question of viral destruction was Doctor Otis Sproul. Dr. Sproul made the following admissions pertinent to the disinfection remedy:

> Chlorine is an effective viricide in water under proper conditions. For best results, chlorine should be present as hypochlorous acid, and *no suspended solids or turbidity should be present.*

Sproul, "Removal of Viruses by Treatment Processes" in Berg, et al. (ed.), *Viruses in Water,* 167 at 173. (Defendants' Exhibit 229, emphasis added)

> These data indicate that for the viruses shown in the table, *free* chlorine residuals of 1 to 2 mg/1 with contact times of 1 to 2 hr. would be required for extensive inactivation in waters with pH values of about 7.8. *Id.* p. 174. (Emphasis added.)
>
> Most disinfection standards for wastewater treatment plants can be met with combined chlorine residuals; *under these standards it is obvious that little virus inactivation is obtained. Id.* p. 175. (Emphasis added.)

The trial court obviously relied on this and other testimony when it found:

> *I am satisfied from the testimony of Dr. Wellings and other witnesses in the case that unless there is a good removal of solids and a free chlorine residual, there is not an adequate*

---

5. Plaintiffs' witnesses included, among others, one of the United States EPA's top experts on virus and virus destruction, Dr. Gerald Berg, and one of EPA's top experts on bacteriology and bacterial destruction, Mr. Edwin Geldrich. Another key witness for plaintiffs was Dr. Flora Mae Wellings of the Florida Department of Health and Rehabilitation Services. Dr. Wellings has done exhaustive studies of viral destruction and was recognized by defendants as a leading expert long before trial.

> *kill of viruses.* There is evidence in the record on both sides of the case which I find convincing on that point. The defendants never have a free chlorine residual by the amperometric test, which I find from the evidence is the more *valid of the two methods of measuring a chlorine residual.* (Appendix F-11.) (Emphasis added.)

The trial court also found that the level of organics and solids involved with the so-called "30-30" effluent limitation urged by defendants would not provide adequate disinfection. There were several reasons for this finding:

1. Even where defendants' plants currently met the 30/30 standard, defendants were never able to achieve a "free" chlorine residual—essential to the destruction of pathogens.

2. Dr. Wellings testified that 30 mg/1 of solids and 30 mg/1 organics (BOD) would tie up the chlorine; and both Dr. Wellings and Mr. Geldreich recommended levels of 5 mg/1 for both solids and BOD. (Tr. 3206, 12402)

3. Even if the District Court had accepted the removal efficiencies claimed by defendants for an effluent with 30 mg/1 BOD and 30 mg/1 solids, *billions* of viruses per day would still be discharged by defendants. (Tr. 12098) The defendants' expert had testified that, when operating at maximum efficiency, a "secondary" activated sludge treatment plant, achieving a 30/30 effluent with chlorination, could achieve an effluent containing 7 infectious viral units per liter of waste waters.[6] (Tr. 10470, 10487) Accepting arguendo defendants' unsupported claim that secondary "30/30" effluent, with chlorination, could achieve an effluent of 7 infectious viral units per liter, Dr. Berg of the EPA pointed out that, even at a few infectious units per liter (a liter is approximately equivalent to a quart), defendants' plants would discharge *billions* of infectious units per day. (Tr. 12097, 12098)

---

6. Plaintiffs' witnesses hotly disputed Sproul's estimates. Sproul had never tested any sewage plants. Dr. Berg testified that secondary plants often achieved from 0-50% virus removal, not the 99% claimed by Sproul.

Thus the trial court's finding that:

> "Even if a 30/30 standard were met, it is my finding that that standard would still result in staggering numbers of pathogens to Lake Michigan." (Appendix F-6.)

On the basis of this evidence that the District Court entered its order that the effluent be treated to a level where solids and organics would be reduced to 5 mg/1 solids and 5 mg/1 BOD with a free chlorine residual. (Appendix F-26, F-11)

After the court announced its findings, the parties were given time to work on an agreed judgment order which reflected the trial judge's findings. On November 14, 1977, rather than have the District Court hear extensive evidence on the details of the remedy to be contained in the judgment order, the parties submitted a stipulation and proposed judgment order.

> The parties agree to be precluded from asserting on appeal any challenge to the engineering feasibility (or to the engineering feasibility of the time schedules for installation) of the transport, collection and treatment facilities and the engineering feasibility of accomplishing the effluent standards set forth in the attached form of Judgment Order. (Appendix E-2.)

It was this agreed judgment order which was jointly prepared by the defendants and the plaintiffs, which the District Court entered on November 15, 1977. Thus the method of collection and the timetables for completion were agreed to by defendants.

D. The Action of the Court of Appeals.

The Court of Appeals followed what can at best be described as divergent paths. On the question of liability the Court of Appeals followed the "clearly erroneous" requirement of Rule 52(a) of the Federal Rules of Civil Procedure.

> The district court found that the defendants dump substantial quantities of pathogen-containing sewage into Lake Michigan each year, that the lake currents carry the pathogens into Illinois waters, where they may infect drinking

> water supplies and pose a danger to swimmers, and therefore that defendants' actions pose a significant risk of injury to Illinois residents. These findings are not clearly erroneous. Rule 52, Fed. R. Civ. P. (Appendix A-26, A-27.)
>
> . . .
>
> The district court found that "bacteria and viruses numbering literally in the millions are transported live and intact from Milwaukee to Illinois waters." [Tr. 14217.] This finding is not clearly erroneous. (Appendix B-10.)

Indeed in a detailed analysis of the evidence underlying liability, the Court of Appeals affirmed on every evidentiary point raised by defendants. (Appendix B-2 to B-25)

Turning to the remedy, the Court of Appeals affirmed the District Court on the requirement that raw sewage be collected and sent to the treatment works rather than discharged in its raw state into public waters. Noting the prohibition of sewage discharges without meeting the discharge limitations of 301(b)(1)(B)[7] of the Clean Water Act, 33 U. S. C. § 1311(b)(1)(B), the court acknowledged the folly of allowing raw sewage discharges to the same system.

> It would be senseless to prohibit the discharge of effluent from publicly owned treatment works not meeting the secondary treatment requirements of § 301(b)(1)(B), if raw sewage can nonetheless be discharged at will from overflow points before it reaches the treatment works. (Appendix A-32, A-33.)

The Court of Appeals observed that both defendants' Director of Engineering and defendants' sanitary engineering consultant had agreed that the continued discharge of raw sewage was not acceptable as an alternative to collection and treatment. (Appendix A-34 to A-35) The Court of Appeals held:

> It is doubtful whether anyone, layman or expert, would argue that the discharge of raw sewage into public waters is a satisfactory alternative to collection and treatment of sewage, even though it may be conceded that it may take

---

7. The Court of Appeals ignored the more stringent limitations which may be imposed under 301(b)(1)(C). See discussion *infra*.

> time to fund and provide collection and treatment facilities, and therefore the raw sewage discharges may have to be endured for the short term. (Appendix A-34)

The court observed that defendants had conceded that the time limits set forth in the judgment order was feasible. (Appendix A-38).[8]

E. The Effluent Limitation.

Having affirmed on the question of liability and having affirmed on that part of the remedy that ordered collection of the raw sewage, the Court of Appeals suddenly switched to a different method of analysis to deal with the effluent limitations of 5 mg/l solids, 5 mg/l BOD and a free chlorine residual ordered by the District Court. The appellate court rejected the District Court's effluent limitations.

The Court gave two reasons for its decision.

First, the court could not find sufficient evidence in the record to determine whether the nationally mandated federal minimum effluent limitation of 30 mg/l suspended solids and 30 mg/l BOD on a monthly average was adequate or inadequate with regard to effective destruction of viral and bacterial pathogens.

> The evidence shows that suspended solids and organic matter interfere with chlorination, and therefore that there is some correlation between suspended solids and BOD_5 and effective chlorination. The evidence does not, however, show how much more effective chlorination would be a [*sic*] 5 mg/l suspended solids and BOD_5 than at 30 mg/l suspended solids and BOD_5; *the difference may be significant or it may be de minimus.* (Appendix A-43; emphasis added.)

---

8. Indeed the time limitations in the order were negotiated by defendants and, if anything, are very liberal. For overflows outside the Combined Sewer Area, the defendants had almost 9 years (November 15, 1977, to July 1, 1986) to correct these overflows. For overflows in the Combined Sewer Area, the defendants have over 12 years (November 15, 1977, to December 31, 1989) to achieve these goals.

Rather than remand to the District Court for the taking of evidence to determine whether this difference is significant or *de minimus*, the Court adopted the 30 mg/l limitation on solids and BOD. Moreover, as to the free chlorine limitation, the Appellate Court followed the same tack.

> *It is not clear whether the fecal coliform*[9] *limitation and the free chlorine residual requirement imposed by the district court can be met with secondary treatment.* In any event, the record support for these limitations is as deficient as it is for the suspended solid and BOD_5 limitations, and we are provided with no explanation of why such limitations were not included in the NPDES permits for the plants and the federal regulations. (Appendix A-46; emphasis added.)

As discussed above, the District Court had more than ample evidence of the fact that a 30/30 effluent could not adequately destroy virus. In two years of records of plant operations, the defendants' plants had virtually never achieved a free chlorine residual even when operating at 30/30. Moreover, even accepting defendants' testimony as to secondary plant efficiency, billions of viruses would be discharged daily.

Instead of remanding for the taking of evidence in these areas where the Court of Appeals felt uncertain, the court engaged in a totally unfounded extra-record presumption. Without a shred of record evidence, the court presumed that the 30/30

---

9. The fecal coliform number in the judgment order was a number negotiated by the parties in preparing the judgment order. Plaintiffs had contended in negotiations that a free chlorine residual should produce a zero fecal coliform bacteria. Defendants asked that the same number that had been negotiated in the other cases—namely 40—be set forth. As such a negotiated number, it necessarily has no basis in the record. What is clear in the record is that the District Court did not want any games played with "geometric" averages. (Appendix F-26, see pp. 25-26 *infra.*)

In another unusual action, the Court of Appeals apparently rejected the District Court's finding of liability and imposition of remedy based on state statutory and state common law grounds. (Appendix A-46, n. 53) Thus the Court of Appeals never discussed the factual or legal basis of the remedy ordered by the District Court on these grounds. See discussion *infra* pp. 26-28.

effluent limitation, with no chlorine residual requirement, was based upon a detailed consideration by federal and state officials that a "30/30" effluent limitation was capable of achieving effective pathogen destruction.

> The record is conspicuously silent as to the reasons these less stringent standards were *found adequate* to protect persons in the immediate environs of the discharges *by experts who were presumably as dedicated to the protection of public health* and the environment as those on whose conclusions plaintiffs rely, and why those reasons are inapplicable here . . . . (Appendix A-45; emphasis added.)

This extra record assumption that some experts somewhere had considered viral destruction in setting the 30/30 effluent limit simply has no basis in the facts of this record. Indeed, the uncontroverted evidence is that even the removal claimed by defendants would release billions of viruses daily. See discussion *infra* at 21-22.

REASONS FOR GRANTING THE WRIT.

I.

IN OVERTURNING THE DISTRICT COURT'S REMEDY AND SUBSTITUTING ITS OWN REMEDY BASED ON EXTRA-RECORD FACTUAL ASSUMPTIONS, THE COURT OF APPEALS USURPED THE BASIC FACT-FINDING FUNCTION OF THE DISTRICT COURT.

An appellate court cannot fashion its own remedial order—especially in a critical area involving public health—on the basis of extra-record factual asumptions.

A. The Application of the Clearly Erroneous Standard.

Preliminarily, the appellate court failed to examine the factual evidentiary basis of the District Court's effluent limitations order under the "clearly erroneous" standard of Rule 52 of the Federal Rules of Civil Procedure. While the appellate court recognized its limited review role under Rule 52 in examining the findings of fact upon which the District Court based its decision on liability, the appellate court ignored this criterion in examining the factual basis of the District Court's effluent limits.

As this Court has pointed out, the appellate court's role with regard to review of factual findings by the district courts is limited:

> In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not

> whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." *Zenith Radio Corp.* v. *Hazeltine,* 395 U. S. 100, 123 (1969).

This deference to the district court's factual findings is particularly true where, as here, much of the evidence regarding remedy was based on witness testimony.

Viewing the evidentiary bases of the District Court's effluent limitations under the clearly erroneous standard, there is no basis for the Appellate Court's action. As explained above, the logic of the District Court's order was as follows:

> 1. In order to chlorine to destroy viral and bacterial pathogens, the chlorine must be in a "free" state, *i.e.* as hypochlorous acid. Organic material—which is often tested as Biochemical Oxygen Demand (BOD)—combines with free chlorine to form "combined" chlorine having little or no disinfection capabilities. Consequently, in order to insure complete destruction of pathogenic organisms, especially virus, it is necessary to have free chlorine rather than "combined" chlorine. To achieve this free chlorine it is necessary to keep organic material (BOD) as low as possible. A level of 5 mg/l of BOD was recommended by plaintiffs' experts.
>
> 2. Even with free chlorine present, the fecal solids in the effluent shield or encapsulate viral and bacterial pathogens from the action of free chlorine. Consequently, it is necessary to reduce the solids in the effluent to as low a level as possible. Plaintiffs' experts recommended a solids level of 5 mg/l suspended solids.

The District Court had ample evidence that the 30/30 standard with no chlorine residual, which was urged by defendants, would not effectively destroy pathogens:

> 1. Testimony by Dr. Berg, an EPA virologist, and an examination of defendants' plants' operating records showed

that defendants virtually never achieved a free chlorine residual measured by the more accurate orthotolodine method. This failure to achieve a free chlorine residual occurred even when the defendants' plants operated within the 30 BOD/30 solids limits.

2. Testimony by Dr. Berg and Dr. Wellings demonstrated that biological activated sludge secondary plants, such as defendants', were characterized by highly variable performance in virus removal, often achieving removal efficiencies of only zero to 50%. (Tr. 12148)[10]

3. Even if the trial court had accepted the testimony of defendants' witness on the viral removal capability of a secondary plant meeting 30/30, the evidence supported rejection of the 30/30 standard for viral destruction. The defendants' sole witness on viral destruction by sewage plants was Dr. Sproul. Even though he had never tested sewage plant effluent for virus in his entire career, Dr. Sproul hypothesized that a secondary biological plant with combined chlorine could achieve 99% removal. Basing his estimate on an incoming concentration of 7,000 infectious units per liter (approximately one quart), Dr. Sproul testified that a well-run secondary plant could achieve an effluent of 7 infectious units per liter. (Tr. 10470, 10487)

The number of infectious units in a quart is irrelevant in light of the size of defendants' operations and the virulence of virus. First, Sproul acknowledged that as small a dosage as one infectious viral unit may be enough to cause disease. (Plaintiffs' Exhibit 236) Second, even accepting a figure of 7 infectious units per liter, that represents a discharge by defendants of

10. It must be emphasized that the 30/30 limits set by the appellate court are monthly *averages* which can allow BOD or solids to go above 100 mg/l on any given day and still meet the average. Such averaging ignores slugs or bad days of contamination and was severely criticized by plaintiffs' private and governmental experts and brings to mind the well-worn anecdote about the man who drowned in a river with an "average" depth of 3 feet.

approximately a *billion* infectious viral units per day. As Dr. Berg testified, the discharge of billions of infectious viral units in a single day is unacceptable. (Tr. 12100) And as the District Court found:

> . . . [E]ven if a 30/30 standard were met, it is my finding that that standard would result in the discharge of staggering numbers of pathogens into Lake Michigan. (Appendix F-6)

The trial court also had ample evidence that a 5 mg/1 standard and free chlorine would destroy virus. Not only did Dr. Wellings recommend 5 mg/1 for virus destruction, but Wellings had also specifically tested facilities designed for 5 mg/1 for viral removal. Dr. Wellings testified that facilities designed to meet the 5 mg/1 standard, i.e. a biological plant followed by sand filtration, were able to completely destroy virus. (Tr. 12399)

Thus, the District Court had more than ample evidence to support the evidentiary findings on effluent limits that:

(a) A free chlorine residual is necessary for effective disinfection, i.e. destruction of disease-causing organisms.

(b) Organic material (BOD) interferes with free chlorine effectiveness by binding with the chlorine to form weak and ineffective disinfectant.

(c) When operated at 30/30 defendants' plants could not achieve a consistent free chlorine residual when measured by the orthotolodine method.

(d) Even accepting defendants' estimates of 30/30 effectiveness in viral destruction, defendants' plants would still discharge billions of viruses per day.

(e) Plants operating under an effluent limitation of 5 mg/1 can and have achieved complete destruction of virus.

This evidentiary base, when viewed in light of the deference to be paid to District Court findings under the "clearly er-

roneous" standard of Rule 52, demonstrates the appellate court's error in overturning these findings and the order on which they were based.

B. The Appellate Court's Failure to Remand.

Had the Court of Appeals applied the "clearly erroneous" standard, the District Court's order should have been sustained. However, the Court of Appeals appears to have been troubled by what it perceived to be a lack of evidence regarding the differing degrees of viral removal at solids at BOD concentrations between 5 mg/l and 30 mg/1.

> The evidence shows that suspended solids and organic matter interfere with chlorination, and therefore that there is some correlation between suspended solids and BOD_5 and effective chlorination. The evidence does not, however, show how much more effective chlorination would be a [*sic*] 5 mg/1 suspended solids and BOD_5 than at 30 mg/1 suspended solids and BOD_5; the difference may be significant or it may be *de minimis.* [footnote omitted.] (Appendix A-43.)

On the contrary—as discussed above—even defendants' most favorable estimate for 30/30 would result in billions of infectious viral units being discharged each day. In contrast, at 5 mg/l no viral units would be discharged.

The Court of Appeals also seemed to find a need for evidence of viral destruction efficiency at levels of solids and BOD between 5 mg/l and 30 mg/l:

> While Wellings, who comes the closest to providing evidentiary support for the suspended solids limitations the court imposed, testified that "the problem with 30 milligrams per liter is you are going to have a lot of organics tied up with solids that is going to use up your chlorine, and the chlorine can't even get into," and there would "still" be "a problem with disinfection," she did not say the same would be true of *any figure between thirty and five.* (Appendix A-44 n. 50.) (Emphasis added)

Preliminarily, having proved that a 30/30 effluent would still contain billions of viruses per day and that 5 mg/l suspended solids and BOD would not, petitioner finds it hard to believe that the successful plaintiff—having proved contamination and the level of protection sufficient to eliminate that contamination —must bear the burden of proof as to the efficacy or lack thereof of every intermediate level of treatment. Other than its defense of 30/30, Milwaukee never tendered to the District Court, the Court of Appeals, or the plaintiffs any intermediate effluent number which would purport to permit destruction of virus. Moreover, should defendants discover and wish to tender such evidence, the Judgment Order expressly provides a modification procedure to be based on an evidentiary record made in the District Court.

Given these facts there was no basis for the Court of Appeals' decision to tamper with the District Court's order. But even if the Court of Appeals had legitimate evidentiary questions, the appellate court cannot reach evidentiary conclusions on the basis of evidence not in the record. Accepting *arguendo* the merits of the Court of Appeals' concerns, the appropriate resolution of these factual doubts lay in a remand to the District Court for the taking of additional evidence to resolve the specific questions raised by the Court of Appeals. *See De Marco* v. *United States,* 415 U. S. 449, 450 (1974); *Cf. Cordova* v. *Fox,* 351 F. 2d 269, 271 (10th Cir. 1965).

Instead of remanding for the taking of additional evidence to provide a factual record for its questions, the Court of Appeals took the startling action of adopting the 30/30 standard with no chlorine residual effluent limits as adequate to destroy viral pathogens. As noted above, the evidence and the District Court's finding were unequivocal that a 30/30 standard—even when viewed in the light most favorable to defendants—would still allow billions of infectious viral units to be discharged each day.

But the appellate court chose to ignore this record evidence and instead to rely on an unusual extra-record presumption that

is totally without foundation and is factually incorrect. The appellate court assumed without any record evidence that the 30/30 effluent limitation imposed on Milwaukee's discharges by administrative agencies was based upon a detailed consideration by federal and state officials that a 30/30 effluent limitation was capable of permitting effective destruction of pathogens.

> The record is conspicuously silent as to the reasons these less stringent standards *were found adequate* to protect persons in the immediate environs of the discharges *by experts who were presumably as dedicated to the protection of public health* and the environment as those on whose conclusions plaintiffs rely, and why those reasons are inapplicable here . . . . (Appendix A-45; emphasis added.)

Nowhere in the record is there any evidence that EPA or the State of Wisconsin has found these "less stringent standards" adequate to destroy virus. Indeed, in the trial below one of EPA's top experts testified that secondary biological plants—which form the basis for EPA's definition of 30/30, 40 C. F. R. Part 133—have very poor performance on viral removal. (Tr. 12247) Even accepting defendants' best estimate of viral removal at 30/30 the defendants' plant would still discharge billions of viral units per day.

In five years of trial preparation and over four months of trial, defendants never brought forward a single EPA or State of Wisconsin official to testify that 30/30 was adequate to destroy virus. Indeed, there is not one bit of record evidence that the federal and state officials even considered viral destruction in setting the 30/30 standard.[11]

---

11. There was consideration of bacterial pathogen destruction. The 200 fecal coliform per 100 ml. monthly average is a "geometric mean." This limit was first established by EPA as part of the definition of "secondary treatment." 40 C. F. R. Part 133, 38 Fed. Reg. 22298 (August 17, 1973). However, at trial below, Edwin Geldreich, an EPA expert on bacterial pathogens who testified for plaintiffs, was critical of the "geometric mean" because it allowed slugs of bacterial contaminants on a given day. (Tr. 3211) What the appellate court did not realize, but what is specifically noted in

(Footnote continued on next page.)

For the appellate court to presume without any record evidence that viral destruction was considered by state and federal officials and that a finding was made that viral destruction was adequate at 30/30 is incredible. The evidence in the record is directly contrary and the appellate court's extra-record presumption should be disregarded. The appellate court should have affirmed the District Court under the clearly erroneous standard of Rule 52. At worst, any evidentiary doubts of the appellate court should have been remanded to the District Court for the taking of evidence on those specific issues.

II.

THE COURT OF APPEALS ERRONEOUSLY DISREGARDED THE PLAINTIFF'S REMEDIES UNDER STATE STATUTE AND COMMON LAW.

A. State Statutory and Common Law Claims Should Be Heard.

As noted above, this Complaint against the City of Milwaukee and its related municipal corporations was brought on three separate legal grounds:

1. federal common law nuisance;
2. state statutory liability for out-of-state dischargers causing pollution in Illinois waters; and
3. state common law nuisance.

The District Court found liability on all three counts (Appendix F-2, F-24) However, the Court of Appeals ignored plaintiffs'

(Footnote continued from preceding page.)

the record below, is that this 200 fecal coliform requirement is a "geometric" average. By using a process of logarithmic averaging called a "geometric" average, Milwaukee has had single day discharges as high as 230,000 fecal coliform per 100 ml. and still has met the monthly and weekly requirements of this "geometric" average. What is clear in the record is that the District Court did not want any games played with "geometric" averages. (Appendix F-26)

state law claims and held that it would only consider federal common law. (Appendix A-46 n.53)

By disregarding plaintiffs' claims under state law the Court of Appeals was able to insert a "common law of the statute" theory into its interpretation of federal common law. (Appendix A-20 to A-23) Using this common law of the statute theory the Court of Appeals used the secondary treatment requirements of § 301(b)(1)(B) of the Clean Water Act as the focal point of its inquiry.

As discussed below, the appellate court's "common law of the statute" approach ignored the fact that the secondary treatment requirements of § 301(b)(1)(B) were simply minimum treatment requirements based on minimal technology. Totally ignored by the Court of Appeals' analysis is the entire water quality framework of § 101(b), the goal of "fishable, swimmable" waters and the detailed mechanisms of § 303 and § 302 of the Act for establishing tougher water quality related effluent limitations for sewage plants. *See*, § 301(b)(1)(C).

Putting the "common law of statute" gloss on federal common law to one side, there is no basis for assuming that the federal statute or the federal common law of nuisance did away with rights and remedies created by state law. Indeed, the federal statute is very clear on this point. Section 510 of the Clean Water Act states:

> Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt *or enforce* (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance

> which is *less stringent* than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States. 33 U.S.C. § 1370 (emphasis added.)

Moreover, § 505(e) of the Act expressly preserves common law remedies:

> Nothing in this section shall restrict any right which any person (or class of persons) may have *under any statute or common law* to seek enforcement of any effluent standard or limitation or *to seek any other relief*. . . . 33 U.S.C. § 1365(e). (Emphasis added.)

Thus, it is clear that the state common law nuisance remedy using the state long-arm statute for *in personam* jurisdiction retains its vitality under the federal statute. *See Ohio* v. *Wyandotte Chemicals Corp.*, 410 U. S. 493, 496 n. 2 (1971); *Committee for Jones Falls Sewage System* v. *Train*, 539 F. 2d 1006, 1009, text and n. 9 (4th Cir. 1976). The State of Illinois has used these state common law nuisance tools with great effectiveness in requiring more stringent levels of effluent control by out-of-state dischargers into Lake Michigan than those imposed by EPA or by local authorities.

Thus, whatever the appellate court considered as the limitation of the "common law of the statute" as it related to the federal common law, these so-called limitations do not bind state common law relief. *Committee for Jones Falls, supra.* The appellate court should have examined the evidence supporting liability and remedy under the state law claims.

B. The Court of Appeals Misunderstood the Statutory Structure of the Clean Water Act.

In applying the federal common law of nuisance the appellate court placed great emphasis on its articulation of a "common law of the statute" theory. Thus, according to the appellate court,

under common law principles the court should look to the structure of the Act for guidance. (Appendix A-21)

However, in turning to the statute for guidance, the Court of Appeals totally ignored the logical structure and design of the Act. To the exclusion of everything else, the court focused on the "secondary" treatment requirements imposed on a publicly-owned treatment works under § 301(b)(1)(B) of the statute. (Appendix A-21 to A-22) What the Court of Appeals either ignored or did not understand is that the secondary treatment requirement is merely a technology-based, minimal level of treatment. Each discharge point must be given further analysis to determine water quality impacts and whether more stringent limitations are to be imposed to prevent violation of a water quality standard. Indeed, § 303 of the Act, in conjunction with § 301(b)(1)(C) of the Act, sets forth a detailed structure whereby much more stringent levels of effluent control are to be imposed to achieve and preserve water quality standard. These more stringent limitations are called "water quality related effluent limitations" and may be employed by the state in which the discharger is located under § 303 and by the EPA under § 302. This remedy is not available to other states such as petitioner.

The water quality effluent limitation process is relatively simple:

1. The beneficial use is designated. The water quality goal for all waters is set forth in § 101(a) of the Act. There is no question here that Lake Michigan is considered by all parties to deserve the highest use of swimming, fishing, and public water supply.

2. Numerical or narrative ambient water quality criteria are designated which are necessary to sustain the use.

3. An effluent limitation is put on the discharger which is sufficiently stringent to prevent a violation of the ambient water quality criteria.

The Court of Appeals ignored this entire water quality related effluent limitation scheme under the statute. Moreover, the appellate court fell into a major trap which polluters often use, but usually unsuccessfully. Milwaukee has managed to turn the focus away from its contamination of Lake Michigan into a court-sponsored squabble as to which agency has or has not protected the public health.

It does not do Lake Michigan or the petitioner State of Illinois any good to point extra-record, accusatory fingers at the State of Wisconsin and EPA. For reasons known best to themselves, they have not seen fit to undertake a water quality limited effluent analysis for viral pathogens under § 303 or § 302 of the Act.

If the statute is to provide guidance in a federal common law nuisance action Illinois suggests that the District Court's effluent limitations are just the kind of water quality related effluent limitations contemplated by §§ 301(b)(1)(C), 303 and 302 of the Act and are thus consistent with the common law of the statute. The District Court found:

> 1. that very low levels—perhaps as little as one infectious viral unit—could infect swimmers and create a hazard for water supply intakes;
>
> 2. that even accepting defendants' representation of viral removal at 30/30 such discharges would result in the discharge of billions of additional infectious viral units per day;
>
> 3. that to destroy virus and to prevent the discharge of virus to the environment, a free chlorine residual was needed and that the filtration of effluent to 5 mg/1 BOD, 5 mg/1 suspended solids destroyed the virus.

If "common law of the statute" is a proper legal theory for analyzing the elements of federal common law nuisance then the district court certainly patterned its analysis after the water quality concerns of the Clean Water Act.

CONCLUSION.

Lake Michigan is a precious body of clean, fresh, clear water in which the people of the State of Illinois have a vital stake. The evidence adduced in the trial below demonstrated unequivocally that Milwaukee has used Lake Michigan as a cesspool. Neither the citizens of Illinois nor the citizens of any other state should have to swim or draw their public water supplies from water contaminated with virus and bacteria.

The District Court, after exhaustive and patient scrutiny of four months of testimony, entered extensive findings setting forth the need for the effluent limitations contained in its judgment order. For the Court of Appeals to ignore the "clearly erroneous" mandate of Rule 52, F. R. C. P. in reviewing the evidence supporting the District Court's remedial order is egregious in itself. But for the appellate court to indulge in unfounded extra-record presumptions that unseen and unspoken "experts" who never testified and who never were cross-examined must have concluded that secondary treatment was sufficient to destroy viruses is preposterous.

Sound principles of judicial administration dictate that facts be determined by the District Court based on evidence properly introduced. Appellate court assumptions of extra-record facts lends itself to potential chaos and strong concerns about due process of law.

If simple property rights were at stake, this court might view these issues as significant to protect and promote sound allocation of judicial functions between trial and appellate courts. But much more is at stake here. The health of the people of the State of Illinois—their right to be protected from the disease hazards created by defendants—cannot be casually disregarded

by an erroneous extra-record factual assumption of the appellate court.

Petitioners respectfully submit that a Writ should be granted.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
JOSEPH V. KARAGANIS,
SANFORD R. GAIL,
Special Assistant Attorneys General,
KARAGANIS and GAIL, LTD.,
150 North Wacker Drive,
Chicago, Illinois 60606,
(312) 782-1905.

October 5, 1979.